Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 329.

CHARLES H. UTERMEHLE, PLAINTIFF IN ERROR,

vs.

MAMIE E. NORMENT, LEROY M. TAYLOR, LEROY M. TAYLOR, JR., AND MILDRED TAYLOR AND DOROTHY TAYLOR, INFANTS, BY LEROY M. TAYLOR, JR., THEIR GUARDIAN AD LITEM, DEFENDANTS IN ERROR.

The defendants in error move the court to advance this case and set it down for hearing at an early day.

A. S. WORTHINGTON,
Attorney for Defendants in Error.

To D. W. BAKER and JOHN C. GITTINGS, Esquires, *Attorneys for Plaintiff in Error:*

Please take notice that I shall submit the above motion to the court at the opening of the court on Tuesday, October 13, 1903, and that I shall at the same time submit to the court in writing the grounds upon which the motion is based, and certain affidavits, copies of all of which papers are hereto appended.

A. S. WORTHINGTON,
Attorney for Defendants in Error.

Received copies of the foregoing motion and notice and of the papers referred to in said notice this — day of October, 1903.

D. W. BAKER,
Of Counsel for Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

CHARLES H. UTERMEHLE, *Plaintiff in Error,*
vs.
MAMIE E. NORMENT, LEROY M. TAYLOR, LEROY M. TAYLOR, JR., and MILDRED TAYLOR and DOROTHY TAYLOR, *Infants*, by LEROY M. TAYLOR, JR., *Their Guardian ad Litem, Defendants in Error.* } No. 329.

I, Leroy M. Taylor, on oath state as follows:

I am one of the defendants in error in the above-entitled cause; Rose M. Taylor was my wife; the defendant Leroy M. Taylor, Jr., is my son, and the defendants in error Mildred Taylor and Dorothy Taylor are my grandchildren. When my wife's father, George W. Utermehle, died he was the owner of over one hundred and sixty-seven parcels of land situated in the District of Columbia, nearly all of which were improved. At the time of the filing of the caveat in this case seventy-nine of said parcels were owned by my wife, now deceased, and forty-seven were held by her sister, Mamie E. Norment, in her own right, and thirty-three were held by said Mamie E. Norment as trustee, and the remainder had been sold to various persons. ~~Among these sold was the property at the corner of Ninth and F streets, in the city of Washington, known as the Masonic temple.~~

LEROY M. TAYLOR.

Subscribed and sworn to before me, a notary public in and for the District of Columbia, this 10th day of October, A. D. 1903.

W. MOSBY WILLIAMS,
Notary Public, D. C. [SEAL.]

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

CHARLES H. UTERMEHLE, *Plaintiff in Error*,
vs.
MAMIE E. NORMENT, LEROY M. TAYLOR, LEROY M. TAYLOR, JR., and MILDRED TAYLOR and DOROTHY TAYLOR, *Infants*, by LEROY M. TAYLOR, JR., *Their Guardian ad Litem, Defendants in Error*. } No. 329.

I, Harry Norment, on oath, state as follows:

I am the son of Mamie E. Norment, one of the defendants in error in the above entitled case. I am 25 years of age, and for several years have been engaged in the real estate business in the District of Columbia. Of the real estate which my grandfather owned at the time of his death about eighty parcels went to my mother, and were, under some agreement between her and my father, Samuel Norment, who was her husband, conveyed to my father in fee-simple. My father died in the year 1891, and by the terms of his will and under a decree of the supreme court of the District of Columbia, sitting in equity in the case of Mamie E. Norment *vs.* Clarence F. Norment *et al.*, No. 13889, equity docket 33, which decree was made on the 23d day of February, 1895, the title to forty-seven of said parcels is now vested in my mother in her own right, and the title to thirty-three of said parcels is vested in her as trustee for the children of said Samuel Norment.

HARRY NORMENT.

Subscribed and sworn to before me, a notary public in and for the District of Columbia, this 10th day of October, A. D. 1903.

ALBERT E. SHOEMAKER,
Notary Public, D. C. [SEAL.]

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

CHARLES H. UTERMEHLE, *Plaintiff in Error*, *vs.* MAMIE E. NORMENT, LEROY M. TAYLOR, LEROY M. TAYLOR, Jr., and MILDRED TAYLOR and DOROTHY TAYLOR, *Infants*, by LEROY M. TAYLOR, Jr., *Their Guardian ad Litem*, *Defendants in Error.*	No. 329.

BRIEF OF THE DEFENDANTS IN ERROR IN SUPPORT OF THE MOTION TO ADVANCE THE CASE.

STATEMENT OF THE CASE.

George W. Utermehle died in Washington April 16, 1889, owning real estate in this District of the value of about one million dollars and possessed also of a large personal estate. He left a widow, two daughters, Mamie E. Norment, wife of Samuel Norment, and Rose M. Taylor, wife of Dr. Leroy M. Taylor, and a grandson, Charles H. Utermehle. He left a will, by which, after giving $9,000.00 to certain relatives in Germany, he devised a certain promissory note for $750.00 and interest and real estate in Washington worth about $20,000.00 to his grandson, Charles. He gave to his wife all the rest of his personal property and devised to her the family residence in Washington. All the rest of his real estate he gave to his daughters, Mamie E. Norment and Rose M. Taylor, to be

equally divided between them. The will will be found in the printed record of the case, pages 116–117. Shortly after Utermehle's death his will was admitted to probate, his grandson, who was then twenty-three years of age, waiving citation and being present in court. By the will the widow was made executrix and she filed her final account in May, 1890. She died on March 13, 1893, leaving a will by which she divided her estate equally between her daughters, Mrs. Taylor and Mrs. Norment, and her grandson, Charles H. Utermehle. She appointed Mrs. Taylor and Mrs. Norment executrices. Her will was probated in March, 1893, Charles H. Utermehle, who was then twenty-seven years of age, again waiving citation as in the case of his grandfather's will. Charles H. Utermehle took possession of the house in Washington which was devised to him in his grandfather's will, collected the rents for a couple of years, and then sold the property for $20,000.00, received the proceeds of the sale and applied them to his own use. From his grandmother, during her life or after her death, under the terms of her will, he received over $100,000.00, all of which practically was part of the personal estate of George W. Utermehle, which he had bequeathed to his wife, and which she in turn divided between her children and her grandchild.

On the 9th day of June, 1900, Charles H. Utermehle filed in the supreme court of the District of Columbia, holding a probate term, a petition averring that George W. Utermehle at the time he executed his will was of unsound mind, and that the execution of the same had been procured by undue influence, fraud, and coercion (5). Mrs. Norment and Mrs. Taylor in July, 1900, filed an answer denying the averments of this petition and at the same time, pursuant to an act of Congress of June 8, 1898 (30 Stat., 436), asked to have the court admit the will to probate as a will of real estate (7, 11). In reply to this last-mentioned petition in September, 1900,

Charles H. Utermehle renewed the charges made in the caveat filed by him in June, 1900 (22).

Mrs. Taylor and Mrs. Norment not only denied the charges made by Charles H. Utermehle, but they set up in their pleadings that he was estopped to contest the will of his grandfather by having taken the real estate which was devised to him by that will and by having received also a sum of money in lieu of the note which was bequeathed to him under that will, and by having received from his grandmother during her life and after her death under her will various sums of money, part of the personal estate bequeathed to her by the will of George W. Utermehle, and by having participated in various ways in the settlement of the grandmother's estate under the provisions of her will.

The main reply of the caveator to the plea of estoppel was that a few days after his grandfather's death his grandmother (Mrs. Taylor and Mrs. Norment being present and acquiescing) had agreed that if he would not contest the grandfather's will his share of the estate would be equalized by the grandmother out of the personalty (22).

A question also arose in the case as to whether Charles H. Utermehle had relieved himself of the alleged estoppel by a certain written tender which he had made to Mrs. Norment and Mrs. Taylor shortly before he filed his caveat (30).

Issues were accordingly made up for submission to the jury of the questions of estoppel, mental incapacity, undue influence, fraud, and coercion (38, 39). Pending this Mrs. Taylor died, leaving a will which was admitted to probate and under the terms of which her husband, her son, and her grandchildren, defendants in error here, took her place in the litigation (33, 38).

The case was tried before Mr. Justice Barnard and a jury. The counsel for the caveator, Charles H. Utermehle, first offered their evidence bearing upon the issue of estoppel, and when they had closed their evidence upon that point the court instructed the jury to render a verdict in favor of the

will upon all the issues, on the ground that the caveator was estopped to contest the will (40). The opinion of the presiding justice is in the record (161).

The case was taken to the Court of Appeals of the District by the caveator on bill of exceptions and the ruling of the trial judge was there affirmed. (The opinion of the Court of Appeals will be found in the Washington Law Reporter, vol. 31, page 323. A copy of it is appended hereto.)

Charles H. Utermehle then brought the case to this court by writ of error.

The principal witness in the case was Charles H. Utermehle himself. In the course of his evidence he stated that the amount of personal property which Sarah Utermehle received under the bequest made by her husband, George W. Utermehle, of the bulk of his personal estate was in the neighborhood of $600,000.00 or $700,000.00 (100). Under a Maryland statute in force in the District of Columbia at that time a residuary legatee of the personal estate of a decedent might give bond for the payment of all debts and be relieved from filing any inventory or otherwise further accounting to the court. Mrs. Utermehle pursued this course, giving bond in the sum of $20,000.00 (3). She never rendered any account. Less than half of the personal estate was accounted for in this case. What had become of the remainder of it did not appear, except that Charles H. Utermehle averred in his pleadings that Mrs. Taylor, Dr. Taylor, her husband, and Mrs. Norment had secured large sums of money from the widow, and "that by reason of the drain upon the finances of said widow and bequests made by her to charity her large estate was reduced from about $600,000.00 or $700,000.00 in 1889 to less than $200,000.00 in 1893, exclusive of certain promissory notes made by her several heirs at law" (26). No evidence was offered tending to show that Mrs. Taylor, Dr. Taylor, or Mrs. Norment had received any money from the widow, except that on certain occasions she

gave equal sums to Mrs. Taylor, Mrs. Norment, and her grandson, Charles H. Utermehle.

There was put in evidence at the trial the record of a suit in equity in the supreme court of the District of Columbia, in which Mrs. Norment was the complainant, and the devisees, executors, and heirs of her deceased husband, Samuel Norment, were defendants. The suit was brought in April, 1892, shortly after the death of Samuel Norment. The bill charged that Samuel Norment had induced his wife to convey all the real estate which came to her from her father to her husband under a certain contract between him and her, which he had not carried out by his will. The result of the suit was a compromise decree, by which Mrs. Norment was given a part of the real estate in fee-simple, and the remainder went to his devisees, who were his children, some of it being held by Mrs. Norment for his minor children. (See the bill of complaint, p. 127, and the final decree, p. 156.)

Other pertinent facts in the case will be found stated in the opinion of the Court of Appeals, a copy of which is appended hereto.

ARGUMENT.

It will be seen from the foregoing statement of the case that the caveator sought about eleven years after the death of his grandfather, during which period he, an adult, had not only silently acquiesced in the provisions of his grandfather's will, but had by numerous overt acts taken benefits thereunder, to have the will declared invalid, thereby unsettling the title to about one hundred and seventy separate parcels of land in the District of Columbia. The proceeding seeks also to reopen the setlement of the estate of the widow, Sarah Utermehle, and to affect the validity of the gifts or disposition made by her after

the death of her husband and prior to her own death of about $400,000.00 or $500,000.00 of personalty. It will be seen that the Court of Appeals questions the jurisdiction of the trial court in this case to consider any issue involving the validity of the will of George W. Utermehle as a will of personalty, or whether even if it had jurisdiction an issue should have been allowed under the circumstances of the case, because of the statute of limitations which in this jurisdiction bars most personal actions in three years. In this suggestion the court seems to have overlooked the fact that if Mrs. Norment and Mrs. Taylor and her representatives are required to account to Charles H. Utermehle for the rents which they have received from the real estate which came to them from their father during the past fourteen years, and to turn over to him a one-third interest in all the real estate involved, the right must be accorded to them to attempt at least to reach that part of the personal estate of their father which their mother took under her husband's will and which in some way disappeared during her lifetime. If suits should be brought by them against the persons who received the $400,000.00 or $500,000.00 in personalty which is unaccounted for, it would be for the defendants in such suits to plead the statute of limitations, if they elected to make such a defense, and the question of the validity of the defense would then be raised and decided.

It will be seen also that during the period of eleven years, when the caveator was apparently acquiescing in the terms of his grandfather's will, the title to about eighty parcels of his real estate passed to Samuel Norment, and that by the equity suit which followed the latter's death, and which involved not only the real estate which came to Samuel Norment from the estate of George W. Utermehle, but a large amount of real estate which belonged to Samuel Norment himself, the title to all these eighty parcels has become so entangled that if the will of George W. Utermehle should be held void it would require years of further litigation to

undo the effect of the decree in the equity suit referred to which was the result of a compromise entered into by all parties, some of whom were infants, and ratified by the court, the compromise being based on the supposition that the will of George W. Utermehle was valid.

It has been the uniform practice in the supreme court of the District of Columbia to give trials of issues involving the validity of wills precedence over all other civil business, because they involve the settlement of estates and the rights of numerous parties. The necessity for early action in this particular case is obvious from what has been above set forth.

There are now pending in the supreme court of the District of Columbia several other suits in which the issue of estoppel, upon which this case turned, is raised, and it is desirable on that account that the important and novel questions of law raised in this case should be speedily determined.

It is respectfully submitted that the motion to advance should be granted.

A. S. WORTHINGTON,
Attorney for Defendants in Error.

APPENDIX.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

CHARLES H. UTERMEHLE, *Appellant*,
v.
MAMIE E. NORMENT ET AL.

WILLS; DECLARATIONS OF TESTATOR; ESTOPPEL.

1. In a will contest testimony as to certain statements or declarations of the testator to the effect that if the caveator, a grandson of the testator, would not take sides in certain legal proceedings then pending in which the testator was interested, he would leave to the caveator a share of his estate equal to that which he would leave to each of the caveator's two aunts, held properly excluded; following Throckmorton *v.* Holt, 180 U. S., 552.
2. One who takes a benefit under a will cannot thereafter be heard to dispute or deny the validity of the will.
3. A party agreeing to the probate of a will and accepting property devised and bequeathed to him thereby is, in the absence of fraud or misrepresentation, estopped to deny the validity of the will, especially where more than eleven years had elapsed before proceedings were brought by him to have it declared void and the status of the other parties had been materially changed.
4. A testator, after a comparatively small provision for a grandson, gave certain real estate and all the rest of his personal estate to his widow, and divided the residue of his real estate equally between two daughters. By consent of all the parties, the will was admitted to probate as a will of personalty, and the provision for the grandson was accepted by him and the real estate devised to him sold. In a proceeding brought by the grandson more than ten years thereafter attacking

the validity of the will, issues were framed, several of which presented the question as to whether the caveator was not estopped to deny the validity of the will. The caveator testified that before the will was probated he was told by one of his aunts that the will had virtually cut him off; that the real estate devised to him thereby had been given him at the solicitation of herself and husband, but that his grandmother, to whom all the personal estate was given, would at her death equalize the matter for him; and in reliance upon this promise, to which the grandmother agreed, he consented to the probate of the will. The will of the grandmother gave him only a share of her estate equal to that given each of his two aunts, which, however, he accepted, made partition of the real estate with his aunts, and parted with his interest. Not until seven years after the death of his grandmother, and eleven years after his grandfather's death, did he seek to avoid the will of the latter. He sought to excuse the delay by claiming that he was ignorant of the law of estoppel, and had acted as soon as he learned his "rights." *Held*, that the acts of the caveator conclusively and as matter of law estopped him to deny the validity of the will; and no fraud or misrepresentation on the part of either of the two aunts being shown, it was wholly immaterial whether or not he was ignorant of the law of estoppel as claimed.

5. *Held*, therefore, that the issue of estoppel having been ruled against the caveator, the trial court properly directed a verdict in favor of the caveatees on all the issues.

No. 1254. Decided May 5, 1903.

Appeal by caveator from an order of the supreme court of the District of Columbia, holding a probate court. Probate No. 3467, admitting a will to probate as a will of real estate, under the act of June 8, 1898. Affirmed.

Mr. R. Ross Perry, Mr. Wilton J. Lambert, and Mr. D. W. Baker for the appellant.

Mr. A. S. Worthington and Mr. T. P. Woodward for the appellees.

Mr. Justice MORRIS delivered the opinion of the court:

This is an appeal from an order of the supreme court of the District of Columbia, sitting as a probate court, whereby the will of one George W. Utermehle, admitted to probate in the year 1889 as a will of personalty, was now also admitted to probate, under the act of Congress of June 8, 1898, as a will of real estate.

George W. Utermehle died in this city, whereof he had long been a resident, on April 16, A. D. 1889, leaving a large estate, both real and personal, of which the realty is stated to have amounted to upwards of one million of dollars in value, and the personalty to something approaching the same amount; and leaving also a will, or paper-writing, purporting to be his will, which bore date on December 7, 1887, and which appeared on its face to have been duly executed for the conveyance of real estate. In and by this will, after a bequest of $3,000 to each one of three several nieces, the testator devised to the appellant here, who was a grandson and a son of a deceased son, a piece of property in this city known as the Young law building, of the value of about $20,000; and bequeathed to him also a promissory note for $750, with the accrued interest thereon, secured by mortgage. To his wife, the grandmother of the appellant, he bequeathed all his personal property absolutely, and he devised to her in fee-simple the real estate, which was their place of residence, namely, the whole of square No. 765 in this city. All the rest and residue of his real estate he devised in fee-simple to his two daughters, Mamie E. Norment, then the wife of Samuel Norment, and Rosa M. Taylor, then the wife of Leroy M. Taylor, as tenants in common, with the proviso that if either daughter was not satisfied with the division thus made she should have only $5, and the whole of such real estate should go to the other daughter.

Mrs. Sarah Utermehle, the testator's wife, was made executrix of the will, with the request by the testator that, inasmuch as he had no debts and all the personal property was to go to her, only a very moderate bond should be required of her as executrix.

On April 26, 1899, Mrs. Sarah Utermehle, the widow and executrix of the deceased, propounded the will for probate. On the same day Rosa M. Taylor and Mamie E. Norment, the two daughters of the testator, and his grandson, the ap-

pellant, who were his only next of kin and sole heirs-at-law, executed and caused to be filed in the court a paper-writing, whereby they waived citation and notice by way of publication, and consented that the court might act upon the petition of the executrix for probate without further notice to them. On the same day the will was by order of the court duly admitted to probate—of course, only as a will of personalty, in accordance with the law of the District, as it then stood.

The executrix then gave bond in the sum of $20,000 for the payment of all just debts and claims against the deceased, all damages that might be recovered against her as executrix, and all the legacies bequeathed by the will, and letters testamentary were issued to her. She proceeded with the administration, paid the funeral expenses, and other charges, the legacies to the three nieces, and the legacy to the appellant of the promissory note for $750, with the accrued interest thereon, amounting to the sum of $2,116.88. She filed no inventory, but filed a statement of account in the particulars specified on May 14, 1890. The personal property, other than as thus disbursed, she retained for herself in accordance with the terms of the will, and converted it to her own use. It is stated that she disposed of a very large part of it in charities.

Besides the legacy of the note for $750 and interest, the appellant received his devise of the Young law building, sold it soon afterward for $20,000, and applied the proceeds to his own use. He also received from his grandmother, apparently in the way of a gratuity, sufficient money to pay a mortgage of $11,500, with some accrued interest, which rested on a farm that he had purchased in Frederick county, Maryland. During all this time he does not appear to have ever in any way manifested dissatisfaction with his grandfather's will, or protested against it.

Mrs. Taylor and Mrs. Norment, the daughters and principal devisees of the real estate of George W. Utermehle, entered into possession of that property forthwith, and made partition of it between themselves, each quitclaiming to the other. Immediately afterwards, on July 18, 1889, Mrs. Norment conveyed all her real estate to her husband, Samuel Norment, who died in possession of it in 1891. This conveyance by Mrs. Norment to her husband would appear to have been procured by some duress exerted by him. At all

events, after his death proceedings in equity were instituted by Mrs. Norment to vacate the deed. She was the second wife of Samuel Norment, and had two children by him; but there were children by his first wife. The result of the proceedings was a compromise ratified by the court, whereby Mrs. Norment received substantially about one-third of all the real estate that had belonged to Samuel Norment.

The caveator was about 23 years of age at the time of the death of his grandfather. He testifies that pleasant relations existed between him and his grandfather, and apparently no unpleasant, although evidently no intimate, relations existed between him and other members of his family. He was present at the reading of his grandfather's will immediately after the funeral, and, although disappointed, made no objection thereto. On the next day at the suggestion of his aunt, Mrs. Taylor, he was present again at his grandfather's house, where there were assembled his grandmother, Mrs. Sarah Utermehle; his aunts, Mrs. Rosa M. Taylor and Mrs. Mamie E. Norment, besides himself, and no one else, as it would seem. His account of what was then and there said and done is, in substance, that Mrs. Taylor did all the talking; that she stated that the will of his grandfather had virtually cut off the appellant; that it had been at the solicitation of Mrs. Taylor and her husband, Dr. Leroy M. Taylor, that his grandfather had left the Young law building to him; that his grandmother, however, would, at her death, equalize the matter for him, as she had all the personal property wherewith so to do; that his grandmother wanted to know the amount of the mortgage on his farm, as she desired to pay it for him, and that he thereupon stated the amount as being $11,500. The talking, as stated by him, was all done by Mrs. Taylor. He does not state that Mrs. Norment took any part in it, but that his grandmother seemed to assent to everything that was said by Mrs. Taylor, and that she repeated after Mrs. Taylor that she desired to pay the mortgage upon his farm, which she did in fact almost immediately afterwards.

This conversation the caveator now claims to have amounted to a promise made to him, that, if he would not oppose the probate of his grandfather's will, his grandmother would equalize the matter for him in and by her own will. And he says that it was in reliance upon this assurance that he signed the paper by which he consented

to the probate. He states, also, that some days afterwards he was requested by Mr. Woodward, who it seems was the attorney who had drawn the will, and was one of the witnesses to it, to go to the office of the register of wills; that he went and met there Mr. Woodward, Dr. Taylor, Mr. Norment, his grandmother Mrs. Sarah Utermehle, Mrs. Norment, and Mrs. Taylor; that he was then asked to sign the paper, which the others had already signed, agreeing to the probate of the will; that he did sign it, but without reading it; that he said nothing at all; that thereupon either Dr. Taylor or Mr. Norment said to him: "That is worth $100,000 to you;" that he replied, "I am much obliged—is that all you wish me?" that they said, "That is all;" and that he then walked away.

On March 13, 1893, Mrs. Sarah Utermehle, the appellant's grandmother and the legatee of the personalty and devisee of part of the realty of George W. Utermehle, departed this life, leaving the same heirs-at-law and next of kin as her deceased husband, and leaving also a will, executed on July 5, 1889, which date, as will be noticed, was within a little more than two months after the time of the alleged promise to the caveator that his grandmother would at the time of her death equalize his share of the estate, according to his own statement. In and by this will the testatrix divided her estate equally between her two daughters, Rosa M. Taylor and Mamie E. Norment, and her grandson, the caveator, giving one-third to each, and appointed her two daughters as her executrices, with the request that only a nominal bond should be required.

Rosa M. Taylor, Mamie E. Norment, and Charles H. Utermehle executed and caused to be filed in court a paper waiving citation and notice for the probate of this will and agreeing to such probate without further notice; and accordingly the will was admitted to probate on March 17, 1893. It seems, however, that some question was raised by the caveators, as to the allowance of commissions to the two executrices on the ground that this would give them an advantage in the estate, and they agreed to renounce their commissions. He made no objection then or afterwards on the ground of any alleged failure by his grandmother to perform the promise which he claims to have been made by her, as already stated. Under the administration he received his distributive share of the personalty, amounting to nearly

$78,000, and the administration was settled and closed. He received also his share of the realty, consisting of square No. 765, which had been the residence of his grandfather and grandmother, made partition of it with his aunts, executed quitclaim deeds to them, mortgaged his own one-third part of it while it was yet undivided, and subsequently allowed it to be sold under the mortgage. This partition took place in 1895.

On May 19, 1900, when ten years had just elapsed from the final settlement of the estate of George W. Utermehle, and after the lapse of nearly seven years after the final settlement of the estate of Sarah Utermehle, the caveator addressed identical letters to his aunts, Rosa M. Taylor and Mamie E. Norment, in which he alleged that at the time of his grandfather's death he was under a misapprehension and ignorant regarding his alleged rights in his grandfather's estate; that misrepresentations had been made in regard to those rights and his interests in the premises; that he now denied the validity of his grandfather's will either as to realty or as to personalty; and that he tendered himself ready to account to Mrs. Taylor and Mrs. Norment for what he had received under the alleged will.

This notification, it seems, he follows up with a suit in ejectment, and with a caveat filed in the probate court on June 9, 1900, against the validity of the will. Mrs. Taylor and Mrs. Norment answered the caveat, and at the same time filed a petition asking for a probate of the will of George W. Utermehle of December 7, 1887, as a will of real estate, under the act of Congress of June 8, 1898.

Pending proceedings in the probate court upon this caveat, and before any issues had been formulated between the parties, Mrs. Rosa M. Taylor died on January 22, 1901, leaving a will executed on December 3, 1889, whereby she devised and bequeathed all her estate to her husband, Dr. Leroy M. Taylor, in fee simple, subject to an annuity of $3,000 a year in favor of their son and only child, Leroy M. Taylor, Jr., and also nominated her husband as the executor of her will. On March 18, 1901, this will was duly admitted to probate, and letters testamentary thereon were issued to Dr. Taylor.

Thereupon, on the same day, Dr. Taylor filed his petition in these proceedings, in which he set forth the will of his deceased wife in his favor, and at the same time set forth a

declaration of trust executed between himself and his son, Leroy M. Taylor, Jr., on February 15, 1901, wherein it was stated that the property devised and bequeathed to him by his wife in fee simple was in fact held by him under a secret trust between her and him for the benefit of their son, Leroy M. Taylor, Jr., and his children, of whom there were then two, yet in their infancy, Mildred Taylor and Dorothy Taylor, with the reservation of certain rights and powers for himself; and he asked that he himself and all the persons named might be made parties to the present proceedings in the place and stead of Mrs. Rosa M. Taylor. They were accordingly made parties, and Leroy M. Taylor, Jr., was appointed by the court as guardian *ad litem* for his infant children.

At last the court determined that issues should be formulated between the parties, to be tried in the probate court itself, with a jury, under the act of June 8, 1898, and there were six such issues drawn up. The first raised the question whether the caveator was estopped to deny validity of the will of George W. Utermehle as a will of personal property. The second raised the question whether he was estopped to deny the validity of the will as one of realty. In the third issue the question of testamentary capacity was raised; in the fourth, that of undue influence; in the fifth, that of fraud, and in the sixth, that of duress. The question of the application of the statute of limitations, which was raised by the caveat and petitions, and all other questions, were reserved for future determination by the court. The caveator, Charles H. Utermehle, was made plaintiff for the purpose of the trial, and all the other parties, as caveatees, were made defendants.

On March 17, 1902, a jury was empaneled and sworn in the cause, and the caveator proceeded to adduce his testimony, which mainly was that of himself. It was mainly addressed to the question of estoppel and to an explanation of his delay in asserting his alleged rights. When the counsel for the caveator announced their testimony on this point as closed, they proceeded to offer testimony upon the other issues. To this the counsel for the caveatees objected and moved the court to direct a verdict against the caveator on the issue of estoppel, and, following that, upon all the other issues. The court ruled out for the time being the offer of the caveator to adduce testimony on the other issues

than estoppel, and seems to have adjourned the jury for the purpose of consideration of the question of estoppel as now raised by the record and by the testimony in the cause. After such consideration the court instructed the jury to render a verdict against the caveator on each and all the issues, and the verdict was so rendered and recorded.

Thereupon an order or decree was rendered, confirming the order of the court of April 26, 1889, whereby the will of George W. Utermehle had been admitted to probate as a valid will of personalty; and now admitting it to probate also as a valid will of real-estate.

From this decree the caveator, Charles H. Utermehle, has appealed to this court.

There are seven assignments of error: (1) That it was error to hold that the caveator was estopped, at the time of the filing of his caveat, from disputing the will of George W. Utermehle as a will of personalty; (2) that it was error to hold that he was estopped from disputing it as a valid will of realty; (3) that it was error to instruct the jury to return a verdict against the caveator on the issues of estoppel; (4) that it was error to direct a verdict against the caveator on all the issues; (5) that it was error to direct a verdict against the caveator on the issues that did not involve the question of estoppel; (6) and (7), which are merely duplications of each other—that it was error to exclude the testimony of the caveator as to certain alleged statements and declarations claimed to have been made to him by his grandfather as to his testamentary intentions toward the caveator.

1. Taking up the last of these assignments first, we find that the purport of the statements and declarations referred to is that George W. Utermehle stated to the caveator on one or two occasions, that if he, the caveator, would not take sides in certain legal proceedings then pending in which he, the grandfather, was involved, he, the grandfather, would leave to the caveator a share of his estate equal to that which he would leave to each of the caveator's two aunts. Now it is very plain to us that under the decision of the Supreme Court of the United States in the case of Throckmorton *v.* Holt, 180 U. S., 552, evidence as to such alleged statements was properly excluded.

It is argued, however, that notwithstanding that decision, such statements are admissible in evidence where there is question of the mental capacity of a testator. But we fail to

see the force of this argument. No one questions, and least of all the caveatees question, the mental capacity of George W. Utermehle at the time at which these statements and declarations are alleged to have been made. And if the meaning of the argument is that they tend to show his subsequent mental incapacity at the time of the making of his will, the plain answer is that they are utterly irrelevant and ineffectual for any such purpose.

2. The substantial question in the present case is that of estoppel. This question controls the whole case, and if the trial court has decided it correctly, the rulings upon other questions are of no consequence. We think that it did decide it correctly.

The doctrine is too well established to need either argument or citation of authority in support of it, that one, who takes a benefit under a will, cannot thereafter be heard to dispute or deny the validity of the will, and it is needless to say that the doctrine is founded upon the plainest principles of justice. We do not understand that this rule of the law is in any manner questioned by counsel for the caveator, nor do we understand it to be denied that in the absence of fraud or misrepresentation the action of the caveator in the premises, as detailed by himself, would constitute a full and complete estoppel upon him to prevent him from contesting the validity of his grandfather's will. He agreed to the probate of that will, and he took property under it, both real and personal, and that this, especially after the lapse of so long a period as eleven years that intervened between the probate and the filing of his caveat that led to the present proceedings, would constitute an estoppel, is very evident.

The claim, however, on behalf of the appellant is that what he did he was induced to do by misrepresentation and fraud; that he was ignorant at the time and for a long time afterwards of the law of estoppel, and that as soon as he discovered what he calls his rights, he notified Mrs. Taylor and Mrs. Norment, and repudiated the will of his grandfather, and offered to account to his aunts, in some way not very clearly defined, for what he had received under the will. This offer to account he regards as equivalent to a tender of the property received by him.

It is exceedingly improbable that all the caveator's relatives, including his grandmother, conspired to defraud this

young man. It is more than probable that the promise, which was made to him, if any there was actually made, was that he should share equally with his aunts in his grandmother's estate; and this promise his grandmother fully and faithfully performod. But, however, this may be, and even if the alleged promise was in fact what he now claims it to have been, it is difficult to see how a promise by his grandmother and subsequent failure on her part to perform it can constitute misrepresentation and fraud on the part of Mrs. Taylor and Mrs. Norment sufficient to induce the appellant to refrain for eleven years from contesting the validity of his grandfather's will. And this is absolutely all the misrepresentation and fraud that is charged or sought to be shown.

There is no pretense that Mrs. Taylor was not acting in good faith when she made the alleged promise on behalf of her mother, nor is there any pretense that Mrs. Norment was guilty of any fraud in connection with it when she merely stood by and said nothing. Neither of them made any promise whatever on her own account; nor is there either allegation or evidence of any fraud, or fraudulent concealment, or fraudulent inducement of any kind practiced by them upon the appellant or held out by them on their own account on which he was led to act. That they were probably desirous to have the will of their father probated without controversy and its validity conceded may well be assumed, although it is not entirely apparent that they received any more of the whole estate under the will than they would have received under the law if there had been no will. But any desire which they may have had to avoid a possible contest cannot be charged to them as fraud. We find no evidence whatever in the record of any fraud or misrepresentation on their part.

The only promise which was made was the promise of the appellant's grandmother, made, it is true, through Mrs. Taylor, but yet, notwithstanding that fact, the promise exclusively of the grandmother. And it was the grandmother who mainly, if not exclusively, profited by the exclusion of the appellant from any large share in the estate. But if the plaintiff relied upon this promise and was induced thereby to forego any action against the will, and that promise was not afterwards performed by his grandmother, the remedy of the appellant was not to return to an attack upon

the will, but was by action of some kind against his grandmother's estate, and he took no such action. Her delinquency, if there was any such, which we greatly doubt, should not be visited upon Mrs. Taylor and Mrs. Norment, who are not shown to have had any part in it.

Then, if there was no misrepresentation or fraud on the part of Mrs. Taylor or Mrs. Norment, it is wholly unimportant whether, at the time when he committed the acts which constitute the estoppel, the appellant was or was not ignorant of the law of estoppel. By those acts he led Mrs. Taylor and Mrs. Norment into a situation from which, notwithstanding the ingenious argument of counsel to the contrary, they cannot now be restored to their original status. Upon the faith of those acts and the probate of the will they surrendered their right to a large amount of personal property, and a large amount of real estate also, to which they would have been entitled in the absence of a will. It is impossible to tell from the record before us whether they fared any better with the will than they would have fared without it; but it is very evident that, by the bequest of the entire personalty by the will to their mother they lost a valuable interest to which they cannot now be restored. It is impossible to restore the original situation; and the attempt to do so would be wantonly to question titles that have long since accrued, including the very title which the caveator has himself disposed of, to the Young Law building.

3. Certain cases are cited to show that, when a person has acted in ignorance of his legal rights under a will as to election whether to take under the will or to assert an independent title against the will, he will not be estopped, if in due time he tenders back to the executor what he has received under the will. These cases are Spread *v.* Morgan, 11 H. L., 588, and Watson *v.* Watson, 128 Mass., 152. But we do not understand that these cases are here applicable. It is, perhaps, a matter of minor importance that there is here no executor now in existence of the estate of George W. Utermehle to whom the appellant could tender back the amount of the personalty which he received from that estate; and perhaps it is equally unimportant that no tender of the real estate received and appropriated by the appellant under the will could be tendered back to such executor in any event, as such executor had nothing to do with the real estate. It is perhaps more important that the appellant has precluded

himself from making any tender whatever of such real estate to anyone by the fact that he has conveyed it away; but assuming that such tender or surrender could be made by the appellant, and assuming that the offer to account which he has made is the equivalent of a proper tender, which is very greatly to be doubted, but which we do not decide, yet the appellant's case is not governed by the authorities cited.

The two cases in question were cases in equity wherein, according to the rule of equity, a party was required to make his election as to which he would take of two inconsistent rights. In the first-mentioned case, that of Spread *v.* Morgan, in the English House of Lords, a man had come into the possession of one piece of property under an ancient entail, and into the possession of another piece of property under a more recent family settlement. The details of the case are complicated, but it will suffice to say that it was inconsistent in equity for the party to hold both pieces as against another man who was also entitled in a subordinate manner to one of the pieces under the family settlement. He was required to elect which of the two pieces he would hold; or rather, the inquiry was whether he had in fact elected when a court of equity held that he should have done so. It appeared that he knew all the facts, but that he did not know that by the rules of equity he was bound to elect.

Speaking for the House of Lords, sitting as a court of appeal, Lord Chancellor Westbury said:

"It is true, as a general proposition, that knowledge of the law must be imputed to every person; but it would be too much to impute knowledge of this rule of equity. Election, as a question of intention, of course implies knowledge. There may be a series of unequivocal acts from which an intention to elect and the fact of actual election may be inferred; but under the circumstances of the present case, it does not appear to me that any such inference can be drawn."

And Lord Chelmsford, in the same case, said:

"In order that a person who is put to his election should be concluded by it, two things are necessary: First, a full knowledge of the nature of the inconsistent rights and of the necessity of electing between them; second, an intention to elect, manifested either expressly or by acts which imply choice and acquiescence."

In the case of Watson *v.* Watson, in the supreme judicial

court of Massachusetts, three nephews and an uncle held a piece of real estate as tenants in common. The uncle died leaving a will, by which he made bequests of his personalty specifically to his nephews; devised about two acres of the common property, by specific description of it, to one of the nephews, James; devised 10 acres of the same property, by similar specific description, to a grandnephew, Horace; and devised the remainder of his real estate, specifically excluding that previously devised, to another nephew, Albert, for life, with remainder in fee-simple to Albert's son. One nephew, Edward, received none of the real estate, and only a legacy of $50 in money. All the parties received their legacies and entered upon the lands devised to them, notwithstanding that, as stated by the court, the devises were ineffectual as against the co-tenants, unless they had confirmed it.

It appears that all the parties were ignorant of the rule of law laid down in Massachusetts in the case of Hyde *v.* Baldwin, 17 Pick., 303, by Chief Justice Shaw, which was this, as stated by the Chief Justice himself:

"It is now a well-settled rule in equity that, if any person shall take any beneficial interest under a will, he shall be held thereby to confirm and ratify every other part of the will; or, in other words, a man shall not take any beneficial interest under a will, and at the same time set up any right or claim of his own, even if otherwise legal and well founded, which shall defeat or in any way prevent the full effect and operation of every part of the will."

Upon being informed of this rule two of the three nephews took no steps to restore to the executor the personal property which they had received, or otherwise to renounce their claims under the will, further than to sign a paper wherein they reserved to themselves the right thereafter to elect, upon a decision of the law, if they should desire. As to them the court held that the rule of law, as laid down in the case of Hyde *v.* Baldwin, applied. But the third nephew Edward, who had received a legacy of $50, but none of the land, stood, it was said, in a different attitude. "Immediately upon being informed of the rule of law, little more than a year after the probate of the will, and before the executor had settled any account in the probate court, or the position of any other person had been changed, he returned his legacy to the executor, and gave him notice that he elected not to take it." It was said by the court, in a suit

thereafter instituted for partition of the whole property, that he could not be held to have made such an election as should deprive him of the right under his independent title to partition of the whole estate.

In that case the supreme judicial court of Massachusetts, by Mr. Chief Justice Gray, said:

"In this Commonwealth it has been decided, in accordance with the opinions of Lord Mansfield, Lord Loughborough, and Lord Redesdale, that the rule (that laid down by Chief Justice Shaw, as already stated) holds good at law as well as in equity. * * * But this doctrine, whether applied in practice on the common law or on the equity side of the court, depends not upon technical rules, but upon principles of equity and justice, and upon actual intention. An election made in ignorance of material facts, is, of course, not binding when no other person's rights have been affected thereby. So if a person, though knowing the facts, has acted in misapprehension of his legal rights, and in ignorance of his obligation to make an election, no intention to elect, and consequently no election, is to be presumed. This has been settled in England by a long series of authorities, of which it is sufficient to cite a few. (Citing cases.)

"Where the law allows the probate of a will in either of two forms—in common form, *ex parte*, upon being presented by the executor, or in solemn form, upon the application of any person interested and notice to all others—a person who has received a legacy under a will proved in common form is permitted, on tendering back the amount to the executor, or bringing it into court, to contest the validity of the will, and compel it to be proved in solemn form. Bell *v.* Armstrong. 1 Add. Eccl., 365, 374, and cases cited. Hamblett *v.* Hamblett, 6 N. H., 333; Holt *v.* Rice, 54 N. H., 398."

We have been at pains to cite these two cases *in extenso*, because they are the principal reliance of the appellant, and his cause was tried in the court below with special reference to the case of Watson *v.* Watson. But we are very clearly of opinion that the appellant is not aided by these authorities. His case is not one of election, but of estoppel. He made his election, when election was open to him; and he is now estopped from seeking that which he declined. It is idle for him to say that he did not know that he had the right of election, and that he acted in ignorance of his rights. Every man of ordinary sense and capacity is bound

to know that he can not take a benefit under a will and at the same time seek to overthrow the will. It was distinctly presented to him to make that election when he was asked to sign the consent to the probate of his grandfather's will; and he then made it, and he confirmed the election by taking his legacy and the real estate devised to him and disposing of it beyond the possibility of his ever being able to return it to the estate. The election referred to in the cases of Watson *v.* Watson and Spread *v.* Morgan is election between two inconsistent rights, not election between two inconsistent courses of action. At the time of the probate of his grandfather's will he knew, as well as he did at any time afterwards, that, if there were no such will, or if he could overthrow such will, he could get a larger share of his grandfather's estate than he could get, or did get, under the will. There was no ignorance on his part of any rights which he might have. What he discovered afterwards, if he discovered anything, was not any alleged right, but the testimony to support that right, which makes a very different proposition.

It is very plain from what is distinctly stated by the supreme judicial court of Massachusetts in the case of Watson *v.* Watson that the right of election there mentioned must have been exercised before the executor has settled his accounts, and before the position of any person in interest has been changed. It is idle to argue here that, because the appellees in these proceedings are in possession of some of the real estate that belonged to George W. Utermehle, therefore the position of no one in interest at the time of the probate of his will has been changed. It is sufficient to say in answer to this argument that the action of the appellant enabled the executrix of George W. Utermehle to divert the whole of the personalty of that estate from Mrs. Taylor and Mrs. Norment, who would have been entitled to a large share of it in the absence of a will. They lost all right to this personalty; they lost all right to a large portion of the real estate, and it is not apparent that the appellant could compensate them for this loss by the surrender of all that he received under the will, even if he were in condition to make such surrender.

We are very clearly of opinion that it is now too late for the appellant to question the validity of his grandfather's will, and that he has estopped himself from so doing. His

course of conduct, as conceded and proved by himself, conclusively and as matter of law operates as an estoppel upon him. There was nothing whatever in the case to be submitted to a jury; and the court was entirely right in directing a verdict for the caveatees. A verdict for the caveatees on the question of estoppel necessarily superinduced a verdict for them on the other issues.

4. We may add here that it is greatly to be questioned whether the probate court had jurisdiction in this case to formulate and try the first of the six issues which were drawn up—that of the estoppel of the caveator to dispute the validity of the will of George W. Utermehle as a will of personalty, or whether, if it had the jurisdiction, the issue should have been allowed under the circumstances of the case.

The will had been admitted to probate as a will of personal property in 1889, with the concurrence and consent of the appellant. Even if that consent had been procured by misrepresentation and fraud, as claimed by the appellant, that fact would have made no difference in the present connection. Acting upon that consent, the executrix took possession of the personalty and distributed it, in accordance with the provisions of the will, to the legatees therein, the principal part of it to herself as the principal legatee. She settled her account, and the administration was at an end; and there had been no case in court for ten years before the appellant's caveat was filed. Even if the will were declared null and void as the result of that caveat, the statute of limitations would interpose an insuperable bar to the recovery of that personalty, or of any part of it, by any administrator of the estate of George W. Utermehle, or by anyone else in interest.

Moreover, upon the caveator's own showing, he received one-third of his grandmother's personal as well as real estate, equal to what each one of his aunts received. Apart from the estoppel which would preclude him from denying that this was the money of his grandmother after he had received it as such, and presuming that it was lawfully and in fact the money of his grandfather, he received more of the personal estate of his grandfather, by the amount of the note for $750 and interest, than either Mrs. Taylor or Mrs. Norment received. With what propriety, then, or to what reasonable purpose could he seek to have the will declared

void as a will of personalty? He would not be entitled to any more, or to as much as he actually received, if the will were so declared.

There was nothing in the appellant's caveat that justified the reopening of any inquiry as to the validity of the will of George W. Utermehle as a will of personal property, and it was an irregularity to have allowed it. But no harm has come from this irregularity, since the result has been to confirm the previous probate of the will, and consequently the settlement of the personal estate thereunder.

From what we have said it follows that the decree appealed from must be affirmed, with costs.

And it is so ordered.